No. 15021.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief, Criminal Division,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from a Judgment of the United States District Court for the Southern District of California, which adjudged appellant to be guilty of Counts Two and Three of an Indictment charging him, in essence, with unlawfully receiving, concealing and transporting, and unlawfully selling a narcotic drug in violation of Section 174 of Title 21, United States Code [R. 5, 11], which judgment imposed upon appellant concurrent three year periods of imprisonment and a fine [R. 12].

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [R. 5].

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

Statement of the Case.

Appellant and his co-defendant Ollie W. Kelley, who was acquitted after trial, were indicted on November 16, 1955 [R. 3-6]. Appellant was arraigned and entered a plea of not guilty to all counts of the indictment on November 21, 1955 [R. 6], waived trial by jury on November 29, 1955 [R. 7] and proceeded that day to trial [R. 15]. The Court rendered its decision acquitting co-defendant Kelley on all counts, acquitting appellant on Count One, and finding appellant guilty on Counts Two and Three at the close of the trial on December 1, 1955 [R. 308, 325].

At the close of the Government's case in chief a motion to strike evidence theretofore admitted [R. 232] and a motion for acquittal [R. 237] were made on behalf of appellant. The trial court denied both motions [R. 237, 240]. The appellant thereafter introduced evidence on his own behalf. The motion for acquittal was not renewed at the close of all the evidence [R. 307, *et seq.*].

Imposition of sentence was set for December 19, 1955 [R. 325]; a motion for new trial was filed on December 6, 1955 [R. 10] and noticed for hearing December 19, 1955 [R. 9].

The motion for new trial was denied [R. 12], sentence was imposed [R. 12] and on December 23, 1955, appellant filed his Notice of Appeal [R. 12] followed on February 10, 1956 by appellant's statement of points on appeal [R. 326].

III.
Statement of Facts.

On a chronological basis, the facts in evidence are as follows:

Fletcher, who had been involved in narcotics transactions since 1940 [R. 59] and who had been twice convicted of narcotic violations [R. 59-61], was released from Folsom Penitentiary in April of 1953 [R. 75]. Fletcher had known appellant and Kelley since 1953 and had prior narcotic transactions with Kelley [R. 76]. After an arrest in February of 1955 Fletcher worked with federal and county officers in their effort to apprehend the bigger peddlers with whom he had formerly been dealing [R. 80-82, 170, *et seq.*].

On August 22, 1955 at about 10:30 a. m. Fletcher contacted Kelley and discussed purchase of heroin. It was arranged that Fletcher was to be contacted by appellant later [R. 20-23, 97]. When no contact was made, Fletcher saw Kelley again on September 13, 1955, gave Kelley Federal Agent Richards' home telephone number where a call was to be made the next morning [R. 26-28, 102-103].

Fletcher was at Agent Richards' house the morning of September 14, accompanied by other officers [R. 28, 137-138], and he took the telephone call that came in from appellant, whose voice was recognized [R. 28-30]. Deputy Sheriff Farrington listened to this call (as well as others made that day) and also recognized the voice of Rayson [R. 29, 36, 193, 217-222]. This listening by Farrington was accomplished by placing his ear to the phone along with Fletcher [R. 193].

During this telephone call the first meeting was set up between Fletcher and appellant at 58th Street and Hoover

for some 15 minutes later [R. 32, 111, *et seq.*], where they actually met, moving on to 57th Street off Hoover [R. 33-34]. Here Fletcher and appellant discussed face to face a sale of two ounces of heroin [R. 34, 114-115], being then under the observation but out of hearing of several of the officers [R. 142, 287-288, 297]. Appellant advised Fletcher he would call again an hour later [R. 35].

After Fletcher had returned to Richards' house he received a second and third call from appellant, within minutes of each other, at approximately noon of the same day [R. 35, 142]. Farrington again listened to both sides of the conversation [R. 36, 144]. Delivery of the $700.00 purchase price was arranged to take place within 15 minutes at 58th Street and Main [R. 37] but delivery of the drugs was put off until 6:30 p. m. [R. 36-37].

Fletcher and appellant met at 58th and Main Streets where $700.00 was paid to appellant [R. 39]. This meeting was observed by several of the officers [R. 145, 298].

At 6:30 p. m. on September 14, 1955 appellant again called and told Fletcher who had answered the telephone that the heroin was at the base of a railroad sign at Budlong and Slauson [R. 41-42, 146-147], from which point it was actually taken by Agent Richards [R. 43, 148]. Agent Richards listened into both parties on this telephone call by placing his ear to the handset [R. 147].

A qualified chemist testified the contents of the retrieved package were heroin [R. 226-229].

Efforts were made, commencing September 22, 1955, to consummate a second sale, but this apparently fell through when the supply available to the appellant was stolen [R. 46-48, 51-52, 164-165]. Meetings had occurred between Fletcher and appellant on this attempt which were observed by others [R. 165-167].

Kelley admitted seeing Fletcher on two occasions during the times in question, but denied that he cooperated in any way as to the sale of narcotics [R. 244-246].

Appellant testified he had loaned money to Fletcher in the latter part of August or the first part of September and that it was repaid at 4:00 p. m. on September 14, 1955 [R. 269-273] at a meeting at 56th Street and Broadway [R. 272]. Appellant denied making any of the calls of September 14 [R. 273, 279] and denied the meetings with Fletcher at Hoover and 58th Street and at 58th and Main [R. 279-280], saying he left home at noon, went to his place of business and returned home at 4:30 to 5:00 p. m. [R. 279, 282-283], the meeting with Fletcher being at 4:00 p. m. on the way home. This testimony was controverted by Sergeant Landry who had followed appellant [R. 286-288], by Farrington and Richards who were with Fletcher continuously until 5:00 p. m. [R. 205-206, 213, 300-303] and by the testimony of all witnesses to the earlier meetings and telephone calls.

Although all the telephone conversations made to Agent Richards' house on September 14, 1955 were recorded [R. 121-124, 203], the recordings were not put in evidence, and there is no evidence in the record that any use was ever made of these recordings or that the officers acted in response to them. The recording was done by attaching a device to the receiver of the telephone [R. 116, 203-204] or as a witness stated,

> "There was some clamp that was attached to the receiver and then it was recorded" [R. 203].

Certain of the officers were listening in at the same time [R. 116, 203], as heretofore shown.

IV.

Argument.

A. Appellant Failed to Renew His Motion for Acquittal at the Close of All Evidence, Thereby Waiving His Right to Have Reviewed the Adverse Ruling of the Trial Court.

Appellant's specifications of error numbers 5, 6, 7 and 8, insofar as the latter deals with insufficiency of the evidence, are not reviewable on appeal. Appellant waived his rights to object to the trial court's denial of the motion for acquittal made at the close of the Government's case in chief by putting in evidence of his own and failing to renew this motion at the close of all the evidence in the case.

Mosca v. United States, 174 F. 2d 448, 450-451 (9th Cir., 1949);

Malatkofski v. United States, 179 F. 2d 905, 910 (1st Cir., 1950);

United States v. Powell, 155 F. 2d 184 (7th Cir., 1946);

Leeby v. United States, 192 F. 2d 331, 333 (8th Cir., 1951).

B. Conflicts of Fact and Credibility of Witnesses Are to Be Decided by the Trial Court.

It is well settled that an appellate court will not review questions of fact nor weigh evidence where there is any substantial and competent evidence to support a finding of guilt. On review the appellate court will consider the evidence and all the inferences which may reasonably

be drawn therefrom from the aspect most favorable to supporting the findings of the court below.

Woodward Laboratories Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853.

And the foregoing is equally applicable to a trial to the court without a jury.

Penosi v. United States, 206 F. 2d 529, 530 (9th Cir., 1953);

C-O-TWO Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

The trial court was of the opinion the case turned on the credibility of the witnesses [R. 307] and it is clear the court below did not believe the story told by appellant [R. 316, 319-321]. Credibility of witnesses and the weight to be given their testimony are for the trier of the facts.

Stoppelli v. United States, 183 F. 2d 391, 394 (9th Cir., 1950), cert. den. 71 S. Ct. 88;

Norfolk v. McKenzie, 116 F. 2d 632, 635 (6th Cir., 1941).

C. There Was Substantial Evidence to Support the Judgment of Conviction.

The finding of guilt by the court was amply supported by the evidence.

The key evidence the Government relies on is as follows: During the morning telephone call of September

14, 1955, Fletcher told appellant he wanted to get two ounces of "stuff" and set up a meeting at 58th Street and Hoover [R. 32, 218-219]. In the course of that meeting, Fletcher stated to appellant he wanted to get two ounces of "stuff". Appellant stated the price would be $350.00 per ounce for one or two ounces or $275.00 per ounce for more than two ounces [R. 34-35, 114-115]. Appellant also stated he would call back in an hour [R. 35].

In the two calls at noon of September 14, appellant stated the earliest he could take care of the business was at 6:30 p. m. Fletcher stated he wanted to get rid of the money and appellant agreed to take it then [R. 36-37, 220-221]. At approximately 12:30 to 1:00 p. m. Fletcher met Rayson at 58th and Main and paid him $700.00 [R. 39].

Later, at about 6:30 p. m. appellant called again and stated the package was at the base of a particular railroad sign and to pick it up [R. 41-42, 147].

The "stuff" referred to in these conversations was heroin [R. 60] and the package found as directed contained 2 ounces and 82 grains of heroin [R. 43, 148, 226-229].

A reasonable inference, rather a compelling deduction from the foregoing, is that appellant placed the narcotic at the base of the railroad sign, thereby both transporting and concealing a narcotic. Appellant, after having received the purchase price and having delivered or aided in the delivery of the narcotics, regardless of how indirectly, was properly found guilty of selling such narcotic.

Furthermore if the finding of guilt be sustained as to either of the counts the judgment must be affirmed where the sentences imposed are to run concurrently.

See:

Doan v. United States, 202 F. 2d 674, 678 (9th Cir., 1953);

Lowden v. United States, 187 F. 2d 484 (9th Cir., 1951);

Danziger v. United States, 161 F. 2d 299, 300 (9th Cir., 1947).

In considering the sufficiency of the evidence, appellee would point out to the Court that certain of the contentions of the appellant are not supported by the record. The representation made at the top of page 5 of appellant's brief that Fletcher paid the $700.00 to appellant at the first meeting on September 14 is incorrect [R. 34, 37-39, 112-115, 117-118].

The further representation on said page that Rayson (appellant) admitted he met Fletcher at the appointed place to receive repayment of the loan is also incorrect. Rayson denied such meeting [R. 279-280], stating the repayment was made at another time and at another place [R. 271-272, 280].

This same error is repeated in appellant's brief in the last part of the first paragraph on page 13.

Appellant's further contention at this last point that "any hypothesis consistent with innocence overrides one that is consistent with guilt," even if correct, is not applicable to this case because it is for the trier of the fact to determine what inferences should be drawn from the evidence and whether they are equally consistent with innocence and guilt, *Stoppelli* case, *supra,* at page 393. Furthermore in this record there is direct evidence of the negotiations for sale and payment of the purchase price to appellant, for which inferences need not be drawn.

D. The Trial Court Did Not Err in the Admission of Evidence nor in the Denial of Appellant's Motion to Strike Evidence. (Appellant's Specifications of Error Numbered 1, 2, 3 and 4.)

Fletcher testified he had previously had numerous telephone calls with appellant [R. 29] a fact not denied by appellant, and that appellant's voice was recognized [R. 28, 30, 35, 41] as to each of the calls. Although counsel objected initially [R. 29] that no foundation was laid for such recognition, there was thereafter no objection made. Farrington also identified appellant as making the calls [R. 217-218] without objection to such identification [R. 218].

Appellant's further objection to the admission of evidence appears to be that testimony of the telephone conversations is incompetent because there was an interception and publication of a wire communication within the proscription of the Federal Communications Act, particularly Title 47, United States Code, Section 605, or an invasion of the Constitutional rights of the appellant.

An unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Constitution.

Olmstead v. United States, 277 U. S. 438 (1928);

Goldstein v. United States, 316 U. S. 114, 120 (1941);

Goldman v. United States, 316 U. S. 129, 135 (1941).

Although appellant repeatedly asserts there is evidence of "wire tapping" in this case, the record does not so show. There were persons, other than the parties conversing, listening with their ears to the receiver [R. 29,

36, 144, 147, 193, 217-222] and there were recordings made at the receiver end [R. 121-134]. All the evidence on the nature of the connection of the recorder to the telephone is contained in the record at pages 116 and 203-204.

There is therefore no evidence of "wire tapping" such as considered in *Nardone v. United States,* 302 U. S. 379 (1937).

Furthermore the entire record clearly shows from a careful reading that the officers acted on what Fletcher told them of the conversations or what they themselves overheard, *e. g.,* R. 194, 197-198, 201-202. There is no showing whatsoever that the officers acted in response to what had been recorded. The rule of the second *Nardone* case is therefore not applicable.

Nardone v. United States, 308 U. S. 338 (1939).

In all events two propositions fully answer appellant. First, there was not a publication within the meaning of the Communications Act. In this respect the Government did not offer the recordings of the telephone conversations, and cases such as those immediately following are inapplicable.

For example in *United States v. Stephenson,* 121 Fed. Supp. 274 (D. C. D. C., 1954), the Court held that the telephone call was intercepted where the wires of the recorder were introduced into the box of the telephone and further held that the *recordings* and *transcript* could not be used. The Court did not hold that either party to the conversation was barred from testifying.

In *United States v. Polakoff,* 112 F. 2d 888 (2nd Cir., 1940), the case was reversed because the recordings were

introduced in evidence (see p. 890). See further discussion of this case below.

Secondly, listening to a conversation on the telephone at the end of one of the parties to the call, or recording such conversation from such location, when done with the knowledge and consent of that party, are not interceptions within the meaning of the Communications Act.

In *Goldman v. United States* (1941), 316 U. S. 129, the Supreme Court held that overheard conversations on the telephone, acquired by use of a detectograph in an adjacent room, were not "interceptions" within the meaning of the statute and were admissible in evidence.

Where police overheard a telephone conversation by listening at the end of an informant, their testimony was held competent because there was no "interception" as defined by the Supreme Court.

> *United States v. Pierce* (N. D. Ohio, 1954), 124 Fed. Supp. 264; affirmed *per curiam* in *Pierce v. United States,* 224 F. 2d 281 (6th Cir., 1955).

To the same effect, where listener placed his ear to the receiver with the consent of the party at that end of the conversation, see

> *United States v. Bookie,* 229 F. 2d 130, 132 (7th Cir., 1956).

In a recent case reviewing prior decisions on this subject, where officers listened in on extensions, their testimony was held to be properly admitted.

> *Flanders v. United States,* 222 F. 2d 163 (6th Cir., 1955).

Listening on an extension with the consent and knowledge of one of the parties is not an interception within the meaning of the statute.

> *United States v. White,* 228 F. 2d 832, 834-835 (7th Cir., 1956).

In another recent case, decided by the Supreme Court of California, In Bank, the Court held that recording a telephone conversation by means of an induction coil and recorder at one end of the call is not an interception within the meaning of Title 47, United States Code, Section 605.

> *People v. Mallotte,* 292 P. 2d 517, 519-520 (Calif. Sup. Ct., 1956).

Decisions which appear to be *contra* to those discussed above have generally been criticized and rejected. The *Polakoff* case, *supra,* for example, has a strong dissent by Clark, Circuit Judge, and one of the concurring judges (Chase) in a subsequent case felt that *Polakoff* had been overruled by the Supreme Court's decision in the *Goldman* case, *supra.* (See Chase's opinion in *Reitmeister v. Reitmeister,* 162 F. 2d 691, at 697, and Clark's concurrence at page 698. See also the *Flanders* case, *supra,* at page 166, and the *Bookie* case, *supra,* at page 132, where *Polakoff* is discussed but not followed.)

Appellant cites a recent decision of this Court as authority for deciding the instant case; namely:

> *United States v. Sugden,* 226 F. 2d 281 (9th Cir., 1955), cert. granted in *Sugden v. United States,* 250 U. S. 952 and affirmed *per curiam* in 351 U. S. 916.

This was a case involving government agents testifying to broadcasts by radio which had been heard by them at a

radio separate and distinct from the sets used by the parties to the broadcast and which were heard by such agents without the knowledge or consent of any of the parties to such broadcasts.

This Court itself alluded to possible distinctions between interceptions of radio communications and of wire communications. (See footnote 2 of the decision p. 284 and comment on knowledge and consent on p. 285.) It is submitted the *Sugden* case is not parallel with either the facts or the law of the present case. Had the agents in the *Sugden* case overheard the transmitted messages by listening at the radio of the receiver, with his permission, the facts would be comparable to the case at bar, and, as this Court has indicated in its opinion, there would then have been no "interception" involved and the evidence of what was heard would be admissible.

V.
Conclusions.

Appellant did not preserve his right to have the sufficiency of the evidence reviewed, but even considering this question on its merits, the appellate court should view the evidence in the light most favorable to upholding the decision of the trial court and, on this basis, there is evidence, inferentially, that appellant transported and concealed a narcotic and direct evidence as to the sale, in that he accepted the purchase price and aided in the delivery of such narcotic.

The evidence admitted relative to the telephone conversations was competent because the "means of communication" was not interfered with and listening at one end of a conversation, with the consent and knowledge of the party at that end, is not an "interception" prohibited by the Communications Act

The Government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,

Attorneys for Appellee, United States of America.